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Recent Developments: U.S. v. 1966 Beechcraft Aircraft: Court Upholds Third Party Forfeiture Under 21 U.S.C. §881

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(Supp. 1985).

⁸⁷ *Id.* § 9-102(a)(ii).

⁸⁸ *Id.* § 9-102(a)(2).

⁸⁹ *Id.* § 9-102(b)(1).

⁹⁰ *Id.* § 9-102(2).

⁹¹ *Id.* § 9-102(3)(c).

⁹² *Id.* 593 F.2d 815 (8th Cir. 1979).

⁹³ *Id.*

⁹⁴ *Id.* at 817.

⁹⁵ *Id.*

⁹⁶ *Id.* at 821.

⁹⁷ See, e.g., *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. Ct. 1984) (In prosecution for sexual assault and child abuse the defendant waived his right to confrontation by threatening to kill the victim).

⁹⁸ 525 S.W.2d 336 (1975).

⁹⁹ *Id.* at 339.

¹⁰⁰ *Mattox*, 156 U.S. at 237.

¹⁰¹ *Douglas*, 380 U.S. at 415.

¹⁰² 197 N.J. Super. 411, 484 A.2d 1330 (N.J. Super. Ct. 1984).

¹⁰³ See *id.* at 484 A.2d at 1332. Although the court used the term "videotape," the procedures to be employed are analogous to closed circuit television.

¹⁰⁴ *Id.*, 484 A.2d at 1334.

¹⁰⁵ Annot., 80 A.L.R.3d 1212, 1214 (1977).

¹⁰⁶ *Id.*

¹⁰⁷ *Mattox*, 156 U.S. at 243.

¹⁰⁸ *Roberts*, 448 U.S. at 64 (quoting *Chambers*, 410 U.S. at 295).

¹⁰⁹ See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, . . .").

¹¹⁰ U.S. CONST. amend. VI.

¹¹¹ U.S. CONST. amend. XIV.

¹¹² U.S. CONST. amend. I.

¹¹³ *Washington v. Texas*, 388 U.S. 14, 23 (1967).

¹¹⁴ *Id.* at 23 n. 21.

¹¹⁵ U.S. CONST. amend. VI.

¹¹⁶ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

¹¹⁷ *Id.* at 606-07.

¹¹⁸ See *California v. Trombetta*, 104 S. Ct. 2528, 2532, (1984) ("Under the due process clause of the fourteenth amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness").

¹¹⁹ E.g., Some videotape statutes permit the admission of videotape testimony, recorded prior to trial, in lieu of direct testimony at trial.

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Johnson v. Mountaire Farms of Delmarva *continued from page 17*

Although the court's decision in *Johnson* is in line with the majority of other state holdings, it is at odds with the slowly developing current trend. In fact, on May 31, 1985, the Court of Appeals of Maryland held that §44 of the Act allows an employee to hold his employer's insurer liable under the theory of intentional infliction of emotional distress resulting from the actions of the insurer. *Young v. Hartford Accident & Indemnity*, 303 Md. 182, 492 A.2d 1270 (1985); see also *Gallagher v. Bituminous Fire and Marine Insurance Company*, 303 Md. 201, 492 A.2d 1280 (1985). *Johnson* seems to put an end to any further expanding of the exclusive remedy exceptions under the Act. In Maryland, as in the majority of jurisdictions, without a showing of a "deliberate intention" to injure an employee, an employer will not be held liable outside of the Act, no matter how grossly negligent he might be. The end result in *Johnson* was that Rodney Adams' estate, because Rodney had no dependents, could only recover medical and funeral expenses.

—Stephen A. Markey, III

U.S.V. 1966 Beechcraft Aircraft: **COURT UPHOLDS THIRD PARTY** **FORFEITURE UNDER 21 U.S.C.** **§881**

In *U.S. v. 1966 Beechcraft Aircraft*, 777 F.2d 947 (4th Cir. 1985), the United States Court of Appeals for the Fourth Circuit followed precedents from the Second, Fifth and Eleventh Circuits to hold that the use of an airplane to transport conspirators to the scene of a drug deal exposes that vehicle to forfeiture under 21 U.S.C. §881 (1982). The court further held that an airplane owned by an uninvolved third party was subject to forfeiture because of his "conscious indifference." *Id.* at 952.

In early 1983, an informant in Greenville, South Carolina contacted the Drug Enforcement Agency (DEA) about a possible cocaine sale. The informant was directed to negotiate a buy and a DEA surveillance operation began. The informant arranged a deal with Brown and Montgomery to buy ten kilograms of cocaine for \$500,000. In late February, Montgomery flew to Ft. Lauderdale, Florida to meet with Gerant and Butler, the cocaine suppliers, and Coddington, a middleman, to negotiate the purchase. After weighing the cocaine and checking its purity, Montgomery flew back to Greenville.

Gerant and Coddington then flew a 1966 Beechcraft from Ft. Lauderdale to South Carolina. There was circumstantial evidence suggesting that the Beechcraft carried the ten kilograms of cocaine. Butler flew a 1969 Aerostar from Ft. Lauderdale to South Carolina with a passenger, Hanna. All parties involved in the deal met at a Howard Johnson's and eventually all were arrested, with the exception of Coddington, who escaped. In addition to recovering the cocaine from an automobile, a search of the hotel rooms revealed an electric money counter, a microscope, several guns, \$4,960 in cash and a marijuana cigarette. A search of the Beechcraft revealed documents indicating that Gerant and Butler were on the plane in the Bahamas three months earlier.

Under authority granted by 21 U.S.C. §881(b)(4), law enforcement officers seized the two airplanes once it was determined they were used to promote the drug transaction. Forfeiture proceedings against Total Time Aircraft, Inc., the owner of the Beechcraft, and Sundance Air, Inc., the owner of the Aerostar, were instituted in federal district court. The consolidated cases were tried without a jury and the district court ruled both aircraft were subject to forfeiture. Sundance Air is a Florida corporation wholly owned by Gerant. The district court determined that by transporting two drug conspirators, Gerant was utilizing the corporation's plane to assist in the illegal act of selling cocaine. Therefore, the Aerostar was used to "facilitate the sale, transportation, possession or concealment of cocaine" which the corporation was aware of through its owner and was subject to forfeiture. *Id.* at 949.

Total Time, is also a Florida corporation owned by David and Virgil Seeright. Total Time allowed Gerant to use the Beechcraft on several occasions, including the trip to South Carolina. The district court found that the Beechcraft transported the cocaine on this particular trip, concluding that it was used to further the "sale, transportation, possession or concealment" of cocaine in violation of 21 U.S.C. §881(a)(4). It further found that David Seeright, the corporation's president, did not inquire into the "purpose of the trip, or what cargo would be carried, required no signed contract, had no clear understanding as to when the plane would be returned, and received no money for its use." *Id.* at 950. In addition, a flight plan was not filed and there was no insurance on the plane. The district court concluded that Total Time did nothing to guard against the illegal use of its plane, and therefore, was not an "innocent owner" within the meaning of the Supreme Court's decision in *Calero-Toledo v. Pearson Yacht*

Leasing, Inc., 416 U.S. 663 (1974). The court then ordered the forfeiture of the Beechcraft to the United States.

Both Total Time and Sundance appealed the forfeitures by protesting that they were improperly denied a jury trial, that airplanes do not constitute forfeiture property and that there was insufficient evidence to allow the forfeiture.

The court of appeals concluded that Total Time and Sundance, despite making timely requests for a trial by jury in their answers to the complaint, waived this right by failing to object to the district court's decision to try the case without a jury. Both defendants "vigorously participated" in the trial without mentioning their earlier request for a jury trial. *Id.* at 951. The court relied on its ruling in *Milner v. Norfolk & Western Railway Co.*, 643 F.2d 1005 (1981), which, according to the court, stood for the proposition that basic equitable principles did not "mandate a jury trial if the plaintiff was on notice that the trial court was planning to adjudicate the dispositive issues of fact in the case and did not object." *U.S. v. 1966 Beechcraft*, 777 F.2d at 951, citing *Miller*, 643 F.2d at 1011, n.1. Since Total Time and Sundance were aware of the court's plan, to allow the defendants to request a jury and then "ambush the trial judge" on appeal would be unfair. 777 F.2d at 951, citing *Palmer v. United States*, 652 F.2d 893, 897 (9th Cir. 1981).

Total Time next asserted that as an "innocent owner" it was exempt from the "broad sweep" of the forfeiture statutes. In *Calero*, the Supreme Court determined that an owner would not be subject to the forfeiture statutes where it was shown the owner was "not only uninvolved in and unaware of any wrongful activity, but that he had done all that could reasonably be expected to prevent the proscribed use of his property." 777 F.2d at 951. Seeright's behavior in the case at bar was determined to be unbusinesslike as well as unwise, particularly in an area "such as South Florida where drug trafficking through the use of private aircraft flourishes." The "conscious indifference" on the part of Seeright established that Total Time failed to do "all that it reasonably could to avoid having its property put to unlawful use." 777 F.2d at 952. Therefore, the Fourth Circuit concluded that the district court did not err in determining that Total Time was not an innocent owner.

The final argument on appeal involved the sufficiency of evidence produced at the trial by the government to support the forfeiture orders. Based on the testimony of Montgomery that the Beechcraft carried co-conspirators Gerant and Coddington, as

well as the cocaine, the court upheld the forfeiture of the Beechcraft. The Government argued that the Aerostar, while not involved in carrying cocaine, facilitated the drug conspiracy by transporting two of the conspirators to the site of the deal and, therefore, it was forfeitable under the statute.

The circuits are divided over whether 21 U.S.C. §881(a)(4), which subjects to forfeiture "all conveyances, including aircraft, vehicles, or vessels to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment" of controlled substances, may reach aircraft only carrying the conspirators to the transaction site. The First, Ninth, and Tenth Circuits have held that §881(a)(4) lays down a per se forfeiture of certain items of contraband but not of vehicles used in the mere transportation of suspected conspirators. However, the Second, Fifth and Eleventh Circuits have resolved that forfeiture is proper when a vehicle only transports the drug dealer to the exchange site.

In aligning itself with the latter viewpoint, the court looked to the legislative history of the statute, which directed that the intent of the provision was to allow forfeiture of property "only if there is a substantial connection between the property and the underlying criminal activity." 777 F.2d at 952. The Fourth Circuit concluded that transporting conspirators to an exchange site establishes a "substantial connection between the conveyance and the criminal activity sufficient to justify an order of forfeiture." 777 F.2d at 953. It was further noted that the private airplane has become an important tool to drug traffickers, particularly by allowing for quick arrivals and departures, and makes their apprehension all the more difficult.

The court's decision regarding the waiver of a jury trial shows a total disregard for the Federal Rules of Civil Procedure. Rule 38(d) states that after a proper request for a trial by jury has been made, all the parties involved must consent before it can be withdrawn. Furthermore, Rule 39(a)(1) stipulates that a withdrawal must be in writing or by verbal consent in open court and entered in the record. Some courts hold that these rules are to be held in strict compliance and any waiver cannot occur unless within the precise terms of the rules. *Palmer*, 652 F.2d at 896. While some courts hold that these rules are not to be strictly construed, see e.g., *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949) cert. denied, 388 U.S. 816 (1949), these courts, including the Fourth Circuit, seem to be ignoring the spirit of the rules. A right to a jury trial "occupies so firm a place in our history and jurisprudence that any seeming curtailment of the

right to jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 485 (1934).

How far the Fourth Circuit is willing to go to enforce 28 U.S.C. §881 remains to be seen. For now, owners of private vehicles need to establish steps to ensure their property is not being used for illegal purposes or else risk being subject to forfeiture. A lack of knowledge of the criminal activity is not sufficient under this recent decision. In addition, allowing ones property to be used only by the conspirators of crimes clearly jeopardizes that property.

—Patricia A. Grace

***Trimper v. Porter-Hayden:* STATUTE OF LIMITATIONS IN ASBESTOS-RELATED WRONGFUL DEATH ACTIONS**

In an attempt to deal with the unique character of asbestos-related deaths and its effect on wrongful death and survival actions, the Court of Appeals of Maryland in *Trimper v. Porter-Hayden*, 305 Md. 31, 501 A.2d 446 (1985), held that wrongful death actions for asbestos-related deaths accrue either upon the discovery of the link between death and exposure to asbestos or upon the date of death, whichever occurs first.

In *Trimper* two widows, Charlotte M. Trimper and Sylvia Sandberg, filed separate actions under the survival statutes for the wrongful deaths of their respective husbands alleging that the deaths of their husbands resulted from their exposure to asbestos and asbestos dust. Both women filed their claims within three years from the discovery of the connection between asbestos exposure and the deaths of their husbands. The Circuit Court for Baltimore City dismissed both actions finding that the claims were time barred and each widow appealed to the court of special appeals where the cases were consolidated. Writ of Certiorari was issued by the court of appeals before the court of special appeals had the opportunity to consider the matter. The question before the court was whether wrongful death and survival actions for asbestos-related deaths are time barred when instituted more than three years after death or whether a discovery rule applies. The court considered the wrongful death claims apart from the survival claims as they are dealt with in separate statutes.

MD. CTS & JUD. PROC. CODE ANN. §3-904(g) (1984) deals with wrongful death and provides that an action for wrongful